FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 21, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, ON BEHALF OF DOYLE DAVIS,	:	TEMPORARY REINSTATEMENT PROCEEDING
Complainant	:	Docket No. CENT 2006-98-DM
v.	:	SC-MD 2006-04
SMASAL AGGREGATES & ASPHALT, LLC,	:	Portable Plant No. 1
Respondent	:	Mine ID 23-02197

DECISION AND ORDER OF TEMPORARY REINSTATEMENT

Appearances: Gregory W. Tronson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Complainant,
Robert C. Johnson, Esq., Husch & Eppenberger, LLC, Kansas City, Missouri, for Respondent.

Before: Judge Zielinski

This matter is before me on an Application for Temporary Reinstatement filed by the Secretary of Labor ("Secretary") on behalf of Doyle Davis pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(2). The application seeks an order requiring Respondent, Smasal Aggegates & Asphalt, LLC ("SA&A"), to reinstate Davis as an employee, pending completion of a formal investigation and final order on the complaint of discrimination he has filed with the Secretary's Mine Safety and Health Administration ("MSHA"). A hearing on the application was held in Kansas City, Missouri, on March 14, 2006. For the reasons set forth below, I grant the application and order Davis' temporary reinstatement.

Summary of the Evidence

SA&A produces aggregate at a crushing and screening facility known as Portable Plant # 1, near Lincoln, Missouri. The immediate supervisor of the facility is Leo Michael Smasal. As its name implies, SA&A operated the quarry and also had an asphalt paving operation. From 2001 through 2004, SA&A was owned by Smasal. Davis began working in the asphalt operation in 2001 as a roller operator and general laborer. His work history was good, and there was no disciplinary or other adverse action taken against him. Tr. 18. In 2004, Smasal terminated the entire asphalt crew. Davis then worked at other jobs, but also worked at the

SA&A quarry because Smasal had told him that he would like him to stay and return to the asphalt operation when he hired another crew. Tr. 21. Smasal later sold SA&A to Kevin Fahey, who also apparently owned another aggregate operation, Beyer Crushed Rock Company. Rick Miller managed both facilities, and Smasal became the on-site supervisor at SA&A. In May of 2005, Miller hired Davis to work at the SA&A quarry, after talking to Smasal. Davis was initially assigned to set up newly purchased conveyors. After a few weeks, he was assigned to drive a haul truck, which he continued to do for the remainder of the year. On December 21, 2005, the workers at the plant were laid off for the holidays, and were told to come back on December 29, 2005, to pick up their checks. On that date, Miller told Davis that he would not be needed for the coming year, i.e., that his employment was terminated. Davis filed a complaint of discrimination with MSHA on January 23, 2006, alleging that he had been discharged because he had participated in investigations of two other discrimination complaints made by miners at the facility, and because he had made safety complaints.

Davis described several actions that he contends were activities protected by the Act. In August 2005, Jay Heetland, an SA&A employee, was fired. According to Davis, the termination was an outgrowth of a heated exchange between Smasal and Heetland, the excavator operator, over Heetland's safety concerns about how the haul trucks approached the excavator. Tr. 63-65. Davis was present during the discussion, and told Smasal that he believed that Heetland's concerns were valid and that the practice being followed was unsafe. Tr. 65. Heetland filed a complaint of discrimination with MSHA, and an investigation commenced. The investigator appeared at the mine site and presented Smasal with a list of approximately four employees that he wanted to interview. Smasal arranged for someone to temporarily take over the subject employee's duties, took him to the investigator, returned him to his job site after the interview, and then took the next person on the list to be interviewed. In late November 2005, MSHA conducted an investigation of another discrimination complaint that had been filed by a SA&A employee, Jason Powell. The investigator followed the same procedure in that case. Davis was interviewed during both of those investigations. The interviews were conducted in the MSHA investigator's private vehicle, and Davis' lasted about 20 minutes.

Davis also brought work-related issues to management's attention. Certain pieces of equipment at SA&A were equipped with radios. Davis felt that the haul truck drivers should also have the ability to communicate with each other and with other staff. He and at least one other haul truck operator had radios that they had acquired with personal funds. They brought the radios in and used them in the course of their duties. Davis raised the topic of radios with Miller, who initially expressed some concern that they would be used for chit-chat. However, Miller relented, and told Davis that SA&A would reimburse the miners for the cost of their radios, and that they should present a receipt for the purchases. Davis testified that not all of the operators had radios, and some were reluctant to expend personal funds for them. SA&A's scalehouse operator suggested that he would order radios. However, he later reported that he had been instructed not to order them. Davis interpreted that response as an indication that SA&A had withdrawn the offer to reimburse miners who had purchased radios. He never presented a receipt for his radio, or otherwise requested reimbursement. Davis and the other miners used their

radios, and there is no evidence that SA&A sought to interfere with that use.

Davis experienced problems with the tires on his haul truck. In his opinion, they showed considerable wear, which led to problems such as blowouts when he encountered rocks or other obstructions. When performing his preshift examinations, he frequently recorded "bad tire" on the examination report. He also had a problem with tire leaks, often discovering that a tire was underinflated during his preshift examination, or in the middle of his shift. These problems were brought to Smasal's attention, both verbally and by the notations on the preshift examination forms, which Smasal reviewed every day. Davis felt that those problems, and others, such as worn tires, lingered for weeks or months, and he called them to Smasal's attention on numerous occasions.

Respondent, through Smasal and Miller, contradicted much of Davis' testimony. Records of repairs performed on tires on the haul truck driven by Davis were produced, and it was explained that problems with haul truck tires, particularly valve stems, were relatively common because of the environment, where they encountered rocks and mud. Tire issues were approached in a graduated fashion, and tires were eventually replaced on Davis' truck. Smasal also testified that Davis was at least partially responsible for the problems, because he struck rocks that should have been avoided. He also drove in dumping areas where he was not supposed to have gone, and encountered mud, which can get compressed between the tandem tires and create problems with the valve stems. Miller also explained that the offer to reimburse miners for the purchase of radios had never been retracted, and confirmed that no one had requested, or been denied, reimbursement.

Findings of Fact and Conclusions of Law

Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), provides, in pertinent part, that the Secretary shall investigate a discrimination complaint "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." The Commission has established a procedure for making this determination. Commission Procedural Rule 45(d), 29 C.F.R. § 2700.45(d), states:

> The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of his application for temporary reinstatement, the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

"The scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Sec'y of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought, if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). The "not frivolously brought" standard has been equated to the "reasonable cause to believe" standard applicable in other contexts. *Jim Walter Resources, Inc.*, 920 F.2d at 747; *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Company,* 22 FMSHRC 153, 157 (Feb. 2000).

While an applicant for temporary reinstatement need not prove a *prima facie* case of discrimination, it is useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test. In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (Aug. 1984); *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

A miner's ability to complain about safety issues and to participate in investigations of discrimination complaints are fundamental rights afforded and protected by the Act. Complaints made to an operator or its agent of "an alleged danger or safety or health violation," and participation in discrimination proceedings are specifically described as protected activity in section 105(c)(1) of the Act. 30 U.S.C. § 815(c)(1). Even on this limited record, the Secretary has presented ample evidence that Davis engaged in activity protected under the Act. He participated in the investigation of two discrimination complaints, and raised issues that pertained to the safe operation of the haul truck.

SA&A argues that Davis' concerns about radios, tires, and other issues were routine non-safety related work discussions that are now being transformed into something they were not. Aside from the discussion about backing haul trucks down to the excavator, Davis agreed that he did not identify his concerns specifically as safety issues, and did not raise them at weekly safety meetings. He felt that he had repeatedly raised his concerns with Smasal and Miller, and that they were well aware of them. Tr. 216-17. Regardless of the label Davis put on his concerns, the issue of the integrity of the tires on his haul truck was very much related to safety. The loaded haul truck weighed approximately 180,000 pounds. It had a total of six tires, including four in

dual tandems on the single rear axle. An underinflated or blown rear tire would very likely affect handling of the truck and, possibly, braking performance. Since the truck was required to operate on occasionally steep grades and rough pit roads, and in close proximity to other equipment, any problems caused by poor tires could pose safety concerns.[1]

As to Davis' participation in the MSHA investigations, SA&A argues that there is no evidence that it knew anything of the substance of Davis' participation, and that the mere knowledge that Davis spoke to an MSHA investigator cannot support an inference that that somehow led to his termination. However, SA&A knew how long Davis had spoken to the investigator, as compared with other miners, and also knew that the second investigation concerned a complaint by Davis' nephew, who Davis most likely would support.

The Commission has frequently acknowledged that it is very difficult to establish "a motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). Consequently, the Commission has held that "(1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action" are all circumstantial indications of discriminatory intent. *Id.*

Respondent had knowledge of Davis' protected activity. His concerns about tire problems were raised directly with management. Moreover, the manner in which the MSHA discrimination investigations were conducted assured that his participation, as well as an indication of its extent, was known to management. Miller, who along with Fahey, made the decision to terminate Davis, testified that he was not informed of the identities of miners who participated in the MSHA interviews. Tr. 194. However, he acknowledged that he may have known the identity of one of the miners involved. Tr. 204-05. Smasal also was required to record items of interest and forward copies of his notes to Miller at the end of each day. Miller agreed that if the miners' identities had been reflected in Smasal's notes, he would have seen them. Tr. 204-05.

Some of Davis' activities, notably, his participation in the second MSHA investigation, occurred in relatively close proximity to the adverse action, which could give rise to an inference that it was motivated, in part, by the protected activity.

While there is no direct evidence of overt hostility toward protected activity by SA&A, there are indications that such information might be developed in the investigation of the

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[1] I agree with Respondent that the radio issue appears to be of limited significance. While Smasal agreed that effective communication can enhance safety, and that SA&A's major pieces of equipment are equipped with radios, there is no evidence that SA&A did anything to discourage the use of radios, or that it retracted the offer to reimburse miners who had purchased their own radios.

complaint. SA&A argues that other miners who spoke to the MSHA investigator are still employed. However, in addition to Davis, some miners who the MSHA investigator sought to interview are no longer employed by SA&A. Tr. 132. The extent of their participation in the investigation and the circumstances surrounding their departures were not explored at the hearing. The limited evidence regarding the incident that apparently led to Heetland's termination suggests that it may have been related to hostility toward safety concerns. It also appears unusual, considering the size of SA&A's workforce, that three miners would be subjected to adverse action within a few months, all of whom lodged complaints of discrimination with MSHA.

The strength of an inference of improper motivation may be countered by the plausibility of an operator's explanation for the adverse action, including any evidence of consistent treatment of other similarly situated employees. These issues are normally addressed in analyzing an operator's affirmative defense to an allegation of discrimination.[2] Respondent introduced evidence that Davis was not a model employee. He was repeatedly counseled about shortcomings, e.g., failure to wear his hard hat when he exited his truck, leaving a fuel nozzle in the "on" position, and driving errors that may have contributed to the tire problems and caused interruptions in production. Miller testified that he and Fahey made the decision to terminate Davis during what amounted to a year-end review, a process that they also followed with respect to the Beyer operation.

However, other evidence calls into question this seemingly plausible explanation. Aside from Smasal's daily notes, which may not have included references to some of the incidents, it is unclear exactly what information the decision was based upon. Smasal, Davis' day-to-day supervisor, typically had input into hiring and firing decisions made by Miller. Tr. 106. However, he was "not involved" in the decision to terminate Davis. Tr. 189. Copies of Smasal's notes show that the fuel nozzle incident occurred on October 27, 2005, and that Davis was confronted and told to watch closer, a response that was later approved by Miller. Ex. R-17. This incident occurred earlier than the second MSHA investigation, which Respondent argues was too far removed from the termination to support an inference of improper motivation. Aside from a failure to check a portion of a preshift examination form, the only other incident appearing in the copies of notes introduced at the hearing was that, on December 16, Davis had failed to wear his hard hat for the third time in thirty days. Ex. R-20. This rapid escalation of management's disciplinary response, from verbal reminders – to termination, particularly in the absence of some other documented business justification for the action, is difficult to understand.

Moreover, there is evidence that suggests that other employees may have committed similar transgressions and suffered no discipline at all. Smasal testified that tire issues were common and that the tire problems with Davis' truck were "about the same" as with the other trucks and vehicles, rebutting the suggestion that he was a poor driver who caused excessive

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[2] *See Ankrom v. Wolcottville Sand & Gravel Corp.*, 22 FMSHRC 137, 141-42 (Feb. 2000).

damage to tires. Tr. 180. Davis testified that many other employees had to be reminded about wearing hard hats, some took as much or more time off from work, and other vehicles often became stuck in mud. Tr. 31-32, 69, 217-25.

The investigation of Davis' discrimination complaint has not yet been concluded and no formal complaint of discrimination has been filed on his behalf. As noted above, there are many issues that should be thoroughly explored before any decision is made by the Secretary whether or not to pursue the complaint. The purpose of a temporary reinstatement proceeding is to determine whether the evidence presented by the Secretary establishes that the complaint is not frivolous, not to determine "whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources, Inc.,* 920 F.2d at 744. Congress intended that the benefit of the doubt be with the employee, rather than the employer, because the employer stands to suffer a lesser loss in the event of an erroneous decision, since he retains the services of the employee until a final decision on the merits is rendered. *Id.*, 920 F.2d at 748, n.11.

I find that there is reasonable cause to believe that Davis was discriminated against as alleged in his complaint, and conclude that the complaint of discrimination has not been frivolously brought.[3]

ORDER

The Application for Temporary Reinstatement is **GRANTED**. Smasal Aggregates & Asphalt, LLC, is **ORDERED to reinstate** Davis to the position that he held prior to December 29, 2005, or to a similar position, at the same rate of pay and benefits, **IMMEDIATELY ON RECEIPT OF THIS DECISION**.

Michael E. Zielinski
Administrative Law Judge

[3] Respondent has requested that an adverse inference be drawn based upon the Secretary's failure to call the MSHA investigator as a witness. No authority has been cited in support of the request, which is denied. As noted above, the Commission's Procedural Rules specifically provide that the Secretary may limit presentation of the case to the testimony of the complainant. Moreover, the inference that Respondent requests be drawn does not logically flow from the concerns expressed about investigative techniques. In addition, it is doubtful that the investigator was peculiarly available to the Secretary.

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